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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1752 OF 2007

1. Ms.Ruchi Mehta,
having address at Shishir,
4th Floor, 15A, Juhu Tara Road,
Santactruz (W), Mumbai 400 049.

2. Mrs. Priya Mehta,
of Bombay, Adult, Indian
Inhabitant, residing at Shishir,
4th Floor, 15A, Juhu Tara Road,
Santacruz (W), Mumbai 400 049.

3. M/s. Priya Galvanising PVt. Ltd.
having address at Shishir,
4th Floor, 15A, Juhu Tara Road,
Santacruz (W), Mumbai 400 049.

4. M/s. Juhi Polymers Pvt. Ltd.
having address at Shishir,
4th Floor, Juhu Tara Road,
Santacruz (W), Mumbai 400 049. ... Petitioners

Versus

1. Union of India,
Through Ministry of Finance,
Aayakar Bhavan, M.K. Road,
Mumbai 400 020.

2. Commissioner of Income Tax-14,
6th Floor, Earnest House,
Nariman Point, Mumbai 400 021.

3. C.G. Menon,
Income Tax Officer-14(3)-1,
6th Floor, Earnest House,
Nariman Point,
Mumbai 400 021. ... Respondents

M. J.D. Mistry with Mr. A.A. Joshi i/by Ranjit & Co. for the Petitioners.

Mr. Ashok Kotangale with Mr. Arun D. Nagarjun for Respondents.

CORAM: F.I. REBELLO &
J.P.DEVADHAR, JJ.
DATED: AUGUST 28, 2007

ORAL JUDGMENT (Per F.I. Rebello,J.) :

. Rule. Heard forthwith.

. The Petitioners have approached this court to impugn the order dated 27.6.2007 in respect of the property identified at Sr. No. 2 of the said order. The order is purported to have been made by Respondent No. 3 in the purported exercise of his powers under Section 281 of the Income Tax Act, 1961.

2. One M/s. Simplex Enterprises had booked and was allotted shop No. 4 admeasuring 2403 sq. ft. (with 1437 sq. ft. of Mezzanine floor) in Virwani Plaza at Pune in June, 1988. The defaulter paid the Earnest Money for procuring the said allotment. On 23.1.1997 an ITCP-1 was served for recovery of the outstanding demand. In June, 1997 the defaulter paid the balance money to the builder and obtained the possession of the said shop. In July, 1998 the Petitioner purchased rights, title and interest of the defaulter in the said Shop. Sale Deed was executed between the Builders and the Petitioners for sale of the said Shop in November, 1998 with the defendants as a confirming party.

3. The Tax Recovery Officer at Pune under the Certificate from T.R.O. Ward 18, Mumbai attached the

said shop on 10.01.2001. That was challenged before the Commissioner of Income Tax. After considering various contentions, the Commissioner held that as on 23.1.1997 what the defaulter owned was a mere allotment letter which was not an immovable property. The status of movable property was changed into immovable property when the balance amount was paid to the Builders and the possession was taken by the Defaulter. This happened in June, 1998. Untill then the status of the property continued to be movable property. This being so, the correct approach for the T.R.O. was to attach this allotment by sending a notice to the Builders. This notice could be under section 226(3) of ITCT 3 of Second Schedule of the I.T. Act. There was nothing on record, that any communication was ever made with the Builders in this regard during the four years period from 23.1.1997 to 30.11.2000 (i.e. when first letter was written to the Petitioner). Some other reason was also given. By order dated 27.8.2003 the Commissioner held that the notice is nonest and set aside the action taken of attachment of the subject property. Consequently attachment of shop No. 4 was vacated.

4. It appears that thereafter Respondent No. 3 came to pass the impugned order on 27.8.2007. By the impugned order the Respondent No. 2 declared the sale of the shop in November, 1998 as null and void.

5. On behalf of the Petitioner it was submitted firstly, relying on the judgment of the Supreme Court in Tax Recovery Officer Vs. Gangadhar Vishwanath Ranade, 234 ITR 188, that it was not open to respondent No. 3 to have passed the order declaring the transaction to be void and secondly it is submitted that at any rate that order was passed without giving opportunity to the Petitioner herein. As the order involved civil consequences, the Petitioner at least ought to have been given an opportunity to point out that the order proposed to be passed by Respondent No. 3 could not have been passed.

. On the other hand on behalf of the respondents, their learned counsel contends that considering the terminology of Section 281 it was not open to respondent No. 3 to have made that order :

6. Section 281 reads as under :

> " Section 281 : Where, during the pendency of any proceeding under this Act, any assessee creates a charge on or parts with the possession by way of sale, mortgage, exchange or any other mode of transfer whatsoever, of any his assets in favour of any the person with intention to defraud the Revenue, such charge or transfer shall be

> void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceedings :
>
> . Provided that such charge or transfer shall not be void if made for valuable consideration and without notice of the pendency of the proceeding under this Act."

. Section 281 had came up for consideration before the Supreme Court in T.R.O. Vs. Gangadhar (supra). The Supreme Court observed that Section 281 merely declared what the law was. The Supreme court further held that section 281 did not prescribe any ajudicatory machinery for deciding any question which may arise under section 281. The court further observed that in order to declare a transfer as fraudulent under section 281, appropriate proceedings would have to be taken in accordance with law in the same manner as they are required to be taken under section 53 of the Transfer of Property Act. After considering various provisions including Rule 11 in the second schedule of the Income Tax Act, the court was pleased to hold as under :

> "If the Department desires to have the transaction of transfer declared void under section 281, the Department being in the

> position of a creditor will have to file a suit for a declaration that the transaction of transfer is void under section 281 of the Income-tax Act."

. Considering the law declared by the Supreme Court, it will be clear that the action of Respondent No. 3 in declaring that the transfer of the property in favour of the Petitioners be void is clearly without jurisdiction.

7. The impugned order also attracted civil consequences. The Respondent No. 3 before passing any such order ought to have given opportunity to respondents if in law Respondent No. 3 could exercise jurisdiction under section 281. That opportunity was also not given. The order therefore, must also be set aside for violation of the principles of natural justice and fair play.

8. For the aforesaid reasons, petition will have to be allowed. We make it clear that the respondents are entitled to proceed against the suit property, by following the due procedure.

9. Rule made absolute accordingly. No order as to costs.

(J.P.DEVADHAR, J.) **(F.I.REBELLO, J.)**